

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)
)
Construction Requirements for) DA 99-974
Commercial Wide-Area 800 MHz) PR Docket No. 93-144
Licensees Pursuant to)
Fresno Mobile Radio, Inc. v. FCC)

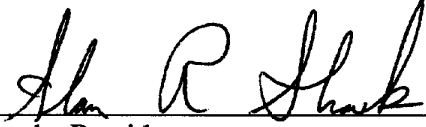
To: Thomas Sugrue, Chief
Wireless Telecommunications Bureau

COMMENTS OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Respectfully submitted,

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July 12, 1999

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in response to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") on May 21, 1999¹, and pursuant to Section 1.415 of the FCC's Rules², respectfully submits its comments regarding appropriate construction requirements for commercial wide-area 800 MHz licensees. For the reasons detailed below, AMTA recommends that the Commission adopt 800 MHz wide-area construction obligations that are consistent with those applicable to licensees of geographically-defined 800 MHz systems.

I INTRODUCTION

1. AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry. The Association's members include trunked and conventional 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") service operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz and 450-512 MHz bands. These members provide commercial wireless service throughout the country. They include virtually all 800 MHz licensees of both Economic Area ("EA") geographic and site-specific wide-area systems. Thus, the Association and its members have a direct, distinct interest in the outcome of this proceeding.

¹Wireless Telecommunications Bureau Requests Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to Fresno Mobile Radio, Inc. v. FCC, Public Notice, DA 99-974, ___ FCC Rcd ___ (rel. May 21, 1999) ("Notice"); New Deadlines for Filing Comments on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees, Public Notice, DA 99-1168, ___ FCC Rcd ___ (rel. June 15, 1999).

²47 C.F.R. § 1.415.

II BACKGROUND

2. The issue in this proceeding is perhaps an inevitable by-product of the FCC's transition from a system of site-specific to geographic-area licensing. Traditionally, licensees authorized under Part 90 of the Commission's rules³ were granted authority to operate specific frequencies at a particular geographic location identified by a set of coordinates. Each authorization was granted on a "site-specific" basis and enabled the licensee to utilize the particular frequencies authorized within the coverage area defined by the technical parameters of the station, conditioned upon placing the station into operation within the prescribed period.

3. The initial wireless "geographic" licenses were issued in the Cellular Radio service wherein, for the first time, the Commission granted licensees the right to use all of their authorized frequencies anywhere within a geographically-defined area, subject only to protecting adjacent area licensees at the borders. Although the FCC initially required cellular licensees to secure individual authorizations for each station constructed, over time that obligation was reduced to a requirement that the Commission be notified when facilities were placed in operation. The construction obligations for cellular systems were similarly based on geographic, not site-specific, coverage and were extended in time to reflect the more substantial effort required to build-out such an area.

4. The geographic licensing model now has become the standard for wireless commercial services, including cellular, Personal Communications Service ("PCS"), Location Monitoring Service ("LMS") and, on an overlay basis, the 800 MHz and 900 MHz SMR and

³47 C.F.R. § 90.1 et seq.

commercial 220 MHz services. Its preferred status is attributable in no small part to the now almost ubiquitous use of auctions to award licenses in these services.

5. Auctions work best when the properties being sold in a single lot are of comparable size and value. In practical terms, it is easier to attract auction participants when the rights being sold are to use particular blocks of frequencies anywhere throughout an identified group of counties than it would be to find parties interested in bidding on the right to operate those same frequencies from one specific location except, perhaps, sites such as the World Trade Center or the Sears Tower. Moreover, bidders are more easily able to assess the value of frequencies when their service areas are defined by county boundaries, rather than by an analysis of the relative interference and service contours of proximate co-channel systems. Thus, auctions and geographic licensing have become complementary aspects of the FCC's wireless licensing framework.

6. Geographic licensing also has proven attractive to many wireless providers. If the scope of the area covered by the license is matched properly to the service being provided so that applicants do not have to bid on substantially more geography than their system is likely to require or, conversely, bid on multiple areas to stitch together the area needed to support a business plan, geographic licenses increase the provider's operational flexibility while reducing regulatory costs and delays. In particular, rather than the location and frequency specific construction obligations associated with site-specific licensing, a regulatory burden for both the licensee and the FCC, geographic license construction requirements typically are defined in terms of population served within the area over a multi-year period.

7. Properly configured geographic licensing works particularly well on clear spectrum. The complexity arises when, as in the case of 800 MHz SMR services, it is overlaid on spectrum heavily encumbered with site-specific licenses. The appropriate inter-relationship of these two licensing schemes is further complicated in this band because of the presence of site-specific, wide-area, extended implementation authorizations, the construction obligations of which are the focus of the FCC's inquiry.

8. 800 MHz SMR systems traditionally had been licensed on a site-specific basis with a one-year construction obligation. However, licensees were permitted to secure "extended implementation" grants if warranted by the scope of the proposed system. Some number of such licenses were issued, typically either on the basis that the applicant had a constructed, analog "footprint" of site-specific licenses over which it intended to overlay a geographically-defined digital, or other more technically efficient system, or on the basis that a licensee or group of licensees of as yet unconstructed stations required additional time to implement a technically advanced system. In both cases, the Commission granted extended implementation authorizations with construction deadlines of up to five years. However, in conjunction with its decision to overlay a geographic-based, auction-awarded licensing model on this band, wherein EA licensees would have a multi-year construction obligation, the FCC stopped accepting extended implementation requests in 1995, accelerated the construction deadline for previously granted systems, and required licensees to rejustify even the abbreviated construction period.⁴ The

⁴First Report and Order, Eight Report and Order, and Second Further Notice of Proposed Rule Making, PR Docket No. 93-144, 11 FCC Rcd. 1463 (1995). The maximum construction period for extended implementation grants was reduced from five to two years.

Commission subsequently acted on those rejustification requests in two separate decisions; some systems satisfied the FCC's rejustification requirements while others did not and their authorizations were canceled.⁵

9. Southern Company, the holder of a wide-area, rejustified extended implementation authorization, appealed this aspect of the Commission's decision. Southern argued that the FCC had not identified any substantive distinction between incumbent wide-area and prospective EA licensees that would justify the imposition of different construction obligations. In its ruling in Fresno Mobile Radio, Inc. v. F.C.C., D.C. Circuit Court agreed.⁶ It stated:

Because the Commission has failed to articulate a satisfactory explanation for its refusal to extend the Interim Coverage Requirement to wide-area SMR licensees, we hold that its decision was arbitrary and capricious in that respect....The Commission did not think seriously about the question whether wide-area incumbent SMR licensees are in fact sufficiently different from EA, cellular and PCS licensees that disparate regulatory treatment is warranted under § 6002(d)(3)(B). We are therefore reluctant to render what may be an uninformed application of the statute to the facts about these various services. Accordingly, we shall remand this matter for the agency to reconsider in the first instance.

10. In response to the Court's directive, the instant Notice solicits comment on the appropriate construction/coverage obligations for incumbent 800 MHz SMR wide-area licensees such as Southern.⁷ It queries whether the FCC should retain the original deadlines that had been

⁵Orders, PR Docket No. 93-144, 13 FCC Rcd. 1533 (WTB 1997), *recon.*, Memorandum Opinion and Order, DA-97-2373 (WTB 1997).

⁶Fresno Mobile Radio, Inc. v. F.C.C., 165 F.3d 965 (D.C.Cir., Feb. 5, 1999) ("Fresno Mobile").

⁷Although the FCC traditionally had referred to these systems as "Extended Implementation", the Court used the term "wide-area" and that appellation will be used henceforth to describe those systems that were granted up to two-year construction deadlines having rejustified their original extended implementation authorizations.

in effect prior to the Fresno Mobile decision or, alternatively, whether the Commission should adopt requirements comparable to those imposed on 800 MHz EA and other geographic-area commercial wireless licensees or use some other standard entirely.

11. For the reasons described below, AMTA recommends that the FCC adopt construction/coverage requirements for wide-area systems that are in all respects consistent with those applicable to 800 MHz EA licensees.

III EXISTING 800 MHz EA CONSTRUCTION AND COVERAGE REQUIREMENTS SHOULD BE EXTENDED TO 800 MHz SMR WIDE-AREA LICENSEES

12. The Commission initiated its proceeding proposing geographic licensing of 800 MHz SMR spectrum over six years ago.⁸ Throughout most of the intervening period, this industry has been "frozen", unable to modify or expand operations, while the FCC determined the appropriate regulatory framework to overlay on this already heavily encumbered spectrum. That effort has proceeded in fits and starts as the agency has been obliged to direct resources toward the implementation of a dizzying array of Congressional directives and agency initiatives intended to revolutionize the competitive nature of the entire telecommunications industry. Although the 800 MHz upper 200 channel auction has been completed and the relocation of incumbents has begun,⁹ the Commission has not yet finalized its rules regarding disposition of the lower 230 800 MHz SMR channels or scheduled the auction of that spectrum. This environment of continued regulatory uncertainty has made business planning extraordinarily difficult and has

⁸Notice of Proposed Rule Making, PR Docket No. 93-144, 8 FCC Rcd. 3950 (1993).

⁹Wireless Telecommunications Bureau Announces the Commencement of the Voluntary Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band, Public Notice, DA 98-2434 (rel. Dec. 4, 1998).

discouraged some licensees from implementing business plans that had been formulated. It is imperative that the FCC bring finality to matters such as those raised in the instant Notice and that the rules adopted be consistent with those governing other wireless services.

13. As a practical matter, there are a relatively small number of remaining licensees with wide-area grants. The passage of time in an era of unprecedented consolidation has resulted in a limited number of parties holding such authorizations. Most site-specific licenses affected are held now by Nextel Communications, Inc. ("Nextel") and Southern, both of which acquired EA licenses in the upper 200 channel auction and both of which are actively building out high-capacity, digital, wide-area 800 MHz systems.

14. In light of the aggressive implementation schedules these companies are pursuing, it is apparent that spectrum warehousing is not likely to be a concern. Moreover, to the extent their systems will, in many respects, provide "substantially similar services" to those provided by cellular and PCS licensees, the Commission is obligated to ensure that they operate under comparable regulatory schemes.¹⁰ Extending the existing construction/coverage requirements for 800 MHz EA systems to wide-area licenses would ensure consistency both between the inter-related portions of 800 MHz operators' existing license holdings and between them and their wireless competitors. Thus, service to be provided on wide-area channels is not only similar to that on EA channels, it will, in most cases, be identical and offered by the same entities, at least for the upper 200 800 MHz channels.

¹⁰Pub. L. No. 103-66, § 6002(d)(3)(B), 107 Stat. 312 (1993).

15. Therefore, AMTA recommends that the Commission adopt for 800 MHz SMR wide-area operators the same three-year and five-year coverage requirement, as well as the alternative "substantial service" showing available to EA licensees in Channel blocks D through V, as is set out in FCC Rule Section 90.685(b).¹¹ Because the licenses themselves were granted as site- and frequency-specific authorizations, rather than large channel blocks as were made available in the upper 200 channel EA auction, the Association does not believe that the channel use requirement detailed in FCC Rule Section 90.685(c) is appropriate or necessary.¹² The relevant population for purposes of measuring compliance with the coverage requirement should be the population included within the service area of the actual wide-area authorization granted, just as the population of the EA is considered when an EA authorization is reviewed. If the grant was for a defined geographic area based on a "footprint", the population would be that within the footprint. If the initial authorization simply granted extended implementation for individual station licenses, the relevant population would be that covered by the station's service area, presumably based on a 40 *dBu* contour analysis. AMTA further recommends that this construction period begin on the effective date of the FCC's decision in the instant proceeding. While this could further extend the construction period for these stations, licensees should not be penalized for exercising reasonable caution when faced with regulatory uncertainty. Once the rules are finalized, the Commission should be confident that a competitive business environment

¹¹47 C.F.R. § 90.685(b).

¹²47 C.F.R. § 90.695(c).

will determine with greater accuracy than could regulatory fiat the necessary speed with which construction will be undertaken.

IV. CONCLUSION

16. For the reasons detailed above, AMTA recommends that the FCC adopt rules consistent with the Association's Comments herein.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby
certify that I have, on this July 12, 1999 caused to be hand delivered a copy of the foregoing
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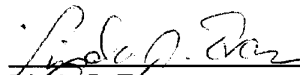
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